J. 1869 - argued - Mr. Robinson for Appt
Phillips contra
Ap w Rev Dam
2.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~291~~ 142

JOHN G. COCKS, APPELLANT,

vs.

CHARLES IZARD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 20, 1867.

Lloyd v. Lynch 28 U 423. Case of purchase
father for use of their exclusive
subsistence absence & hindrance
of Comfort

SUPREME COURT OF THE UNITED STATES.

No. 291.

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1 Circuit Court of the United States for the fifth circuit and district of Louisiana.

Bill in Chancery.—Filed Sept. 27, 1866.

JOHN G. COCKS
vs.
CHARLES IZARD. } No. 4,073.

To the honorable the judge of the United States Circuit Court for the eastern district of Louisiana, in chancery sitting:

John G. Cocks, a citizen and resident of the State of Mississippi, bring this his bill against Charles Izard, a citizen of the State of Louisiana, and a resident of the parish of Orleans, in that State; and thereupon your orator complains and says that he is the true and lawful owner of two lots of ground situate in the first district of New Orleans, in the State of Louisiana, in the square bounded
2 by Nayades, Prytania, Clio, and Erato streets, designated by the numbers thirty-one and thirty-two, on a plan deposited in the office of T. O. Stark, notary of this parish of Orleans, as plan No. 103. The said lots adjoin each other, and measure each twenty-nine feet front on Erato street, by one hundred and fifty nine feet nine inches and ten lines in depth, between parallel lines, together with all the buildings and improvements thereon, being the same property acquired by your orator from Alex. Brother, by authentic act, passed before Theodore O. Stark, a notary, on the first day of June, 1852. The said property, with the buildings and improvements thereon, and appurtenances thereunto belonging, constitute a commodious dwelling-house, of the full value of fifteen thousand dollars, and was in the undisputed possession of your orator by unquestioned and unquestionable title until the defendant, Charles Izard, on the 28th day of January, 1865, being at that time in possession of the said property as your orator's tenant, by a series of illegal and fraudulent devices obtained an apparent and merely and colorable title. On that day the said property was offered for sale at public auction by a person who pretended to act as deputy
3 of a pretended marshal of a pretended court, calling itself, and assuming to exercise judicial authority under the title of, the United States Provisional Court for the State of Louisiana. The person who assumed to act on the occasion as the deputy of the said pretended marshal, offered the said property for sale under the authority of an alias writ of fieri facias, issued in a cause entitled Robert Anderson, trustee, *vs.* your orator, John G. Cocks, No. 112, on the docket of said pretended court.

Now, your orator is advised, and alleges the fact to be, that the said pretended United States Provisional Court for the State of Louisiana had no legal existence, being unknown alike to the Constitution and laws of the United States and the State of Louisiana; that all the proceedings which took place in said suit were coram non judice, and utterly null and void; and that it could render no judg-

ment and issue no process or writ which had, or could have, any force to bind or affect the rights and interests of your orator.

4 Your orator further alleges that if the said court had been a lawfully constituted and competent tribunal, it could render no decree against him, for the reason that no citation or other sufficient legal process was ever served or otherwise executed upon your orator in the said suit of Anderson, trustee, *vs.* your orator, or could by any possibility have been served upon him, inasmuch as your orator was not at that time an inhabitant of Louisiana, resident or sojourner of this State; had no domicil in this State, nor power-of-attorney to any person in this State to receive service of citation for him, or any other legal process, and never was in any manner a party to said suit, either by service of process, or appearance either in person or by attorney at that time—say during the pendency of said suit—neither the said Anderson nor your orator were citizens or residents of the State of Louisiana.

Your orators further alleges that if the said court was competent, and judgment properly rendered, and the said alias writ of fi. fa. lawfully issued against him, all of which he denies, still that the said pretended judicial sale, under which the said defendant pretends to hold the said property, was utterly null and void, for the reason that

5 no notice of seizure, or notice to appoint appraisers, was served upon him, and that, in fact, your orator was absent out of the State, and had no notice or knowledge of the proceedings in execution of said judgment.

Your orator further states that at the offering of the said property for sale, on the 28th day of January, under the alias writ of fieri facias, in the case of Anderson, trustee, *vs.* John G. Cocks, it was knocked down and pretended to be adjudicated to the said defendant, Charles Izard, under the following circumstances: The said Izard gave out and let it be understood that he was bidding for said property at the time of the auction aforesaid, for account of your orator, and in his interest; and persons in attendance at the sale, who were ready and willing to bid more for the property than the price at which it was adjudicated to said defendant, refrained from bidding, not wishing to compete in bidding with your orator, or a party who was understood to represent him. Thus competition was prevented, and the said property was knocked down to the said defendant at the price of fifteen hundred dollars, an amount barely equal to one year's rent of the said property.

6 Your orator further alleges that since the said pretended adjudication, the said defendant has admitted that he bid off and purchased the said property for account of your orator, and has promised to reconvey it upon reimbursement of advances and charges, but always proposed to postpone the reconveyance to some future time or more convenient season, until finally he has absolutely refused to recognize your orator's title to and interest in said property, and asserts an adverse title in himself.

Your orator alleges that the said defendant has enjoyed the rents of said property since the date of the said pretended adjudication,

and that he is accountable to your orator for the same; that the rent of the said property for the last year, 1865, was worth fully one thousand dollars, and for the present year, 1866, fully fifteen hundred dollars per annum. Your orator further represents that he has repeatedly offered, and is and has been ready at all times, since the date of said adjudication, your orator being at that time in Mississippi, where he then resided, as he does now, and is now ready to refund to said defendant any balance that may be due him, if balance there be, of the price of the pretended adjudication, (the same
7 having been applied to the extinguishment of a just debt due by your orator, whether the proceedings in said Provisional Court were null or not,) and any other charges and expenses he may have paid and disbursed, in respect to said property, upon an account between the parties charging your orator with the price of the adjudication and advances, made by said defendant on account of said property, and crediting your orator with a reasonable rent from the 28th day of January, 1865, and such time as your orator may be restored to the possession of said property; all which acts and doings of the said Charles Izard are against equity and good conscience, and tend to the manifest wrong and oppression of your orator in the premises. In consideration whereof, and in as much as your orator can only have adequate remedy and relief in the premises in a court of equity, where matters of this kind are properly cognizable, may it please your honor to grant to your orator your most gracious writ of subpoena, to be directed to the said Charles Izard, commanding him at a certain day therein limited, and under a certain penalty, to appear before this honorable court, and then and there full, true answer make, and all the matters herein alleged against him,
8 dispensing, however, with his answer under oath. And your orator prays that after a full hearing, your honor would order an account to be taken between your orator and the defendant, charging your orator with the price of the adjudication paid by the defendant, and all other lawful charges and expenses by him paid and borne, in respect to the said property, and crediting your orator on the other hand with a reasonable rent for said property since the 28th of January, 1865, and down to such time as your orator may be restored to the possession of the property herein claimed and sued for; that in case any balance should be found to be due your orator upon said account, then that your honor would render a decree in favor of your orator for said balance and such interest as your honor may find to be justly due; and also that the said defendant be ordered to execute to your orator a valid and sufficient title to said property, unencumbered by any encumbrance resulting from any of the defendant's acts or omissions; and in case a balance should be found to be due from your orator to the defendant, then that your honor would be pleased to order and direct the defendant, and execute in favor of your orator such clear title, upon receiving the
9 balance that may be found to be due him, that your orator's title to said property be quieted; and your orator prays for

costs of suit, and all general equitable relief, aid, and remedy the nature of the case may require.

(Signed) I. N. LEA,
Of Counsel, Solicitor for Petitioner.

Subpœna in chancery.

The President of the United States to the marshal for the eastern district of Louisiana, greeting:

UNITED STATES OF AMERICA:

You are commanded to summon Charles Izard, a citizen of the State of Louisiana, to appear before the honorable the judges of the sixth judicial circuit of the United States of America, at a Circuit Court, to be holden on the first Monday in November, 1866, then and there to answer a bill in chancery filed against him, wherein John G. Cocks, a citizen of the State of Mississippi, is complainant, and said Charles Izard is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 27th day of September, in the year of our Lord one thousand eight hundred and sixty-six, and the 91st year of American independence.

[SEAL.] (Signed) CHS. CLAIBORNE, *Clerk*,
By F. B. VINOT, *D'y Clerk.*

The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States Circuit Court on or before the first Monday in November, 1866, otherwise the bill may be taken pro confesso.

(Signed) CHS. CLAIBORNE, *Clerk.*
By F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received September 27th, 1866; and on the 29th day of same month and year, served a copy of the within subpœna in chancery, on Charles Izard, the defendant named herein, personally at his domicil, No. 169 Erato street, in this city.

(Signed) M. EGAN,
Deputy U. S. Marshal.

New Orleans, September 29th, 1866.

11 *Entry at Rules.—From chancery order docket.—Appearance of defendant at November rules.*

JOHN G. COCKS
vs.
CHARLES IZARD. } No. 4,073.

MONDAY, 5*th*, 1866.

The defendant, Charles Izard, by his solicitor, D. Stuart, esq'r, entered his appearance to complainant's bill.

Circuit Court of the United States for the district of Louisiana.—In equity.—No. 4,073.

Demurrer.—Filed Nov. 28*th*, 1866.

The demurrer of Charles Izard, defendant to the bill of complaint of John G. Cocks, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set
12 forth and alleged, doth demur thereto, and for cause of demurrer sheweth that the said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant in this court, and that he hath a full, adequate, and complete remedy at law for his alleged wrongs and injuries, and the same ought properly to be asserted in a court of law and are without the jurisdiction of a court of equity. Wherefore this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) D. STUART,
Solic'r and of Counsel for Defendant.

Order demurrer fixed for trial.—From the minutes of January 19, 1867.

J. G. COCKS
vs.
CHAS. IZARD. } No. 4,073.

13 On motion of John Finney, solicitor for complainants, ordered that the demurrer herein filed by respondent be fixed for argument on Thursday, 24 inst., at 11 a. m., and that said respondent be notified hereof.

Hearing and submission of demurrer.—From the minutes of January 24th, 1867.

JOHN G. COCKS
vs.
CHAR'S IZARD. } No. 4,073.

The demurrer herein filed by the defendant was called up for trial.—John Finney, esq'r, for complainant; D. Stewart, esq'r, for defendant and respondent, not present—when the attorney for the complainant submitted the same to the court upon the pleadings in the record.

Order revoking proceedings on demurrer.—From the minutes of January 26th, 1865.

JOHN G. COCKS
vs.
CHAR'S IZARD. } No. 4,073.

14 It appearing that the defendant has not been notified of the trial of the demurrer, it is ordered [ordered] that the cause be reinstated, and that the complainant be notified hereof.

Marshal's return.

Received January 28th, 1867; and on the same day served a copy of the within order on John Finney, esq'r, the attorney named herein, personally at his office, No. 21 Commercial Place, in this city.

(Signed) PHILLIP McKENNA,
D'y U. S. Marshal.

N. Orleans.

Motion and order demurrer fixed for trial.—From the minutes of January 28th, 1867.

JOHN G. COCKS
vs.
CHAR'S IZARD. } No. 4,073.

On motion of John Finney, esq'r, solicitor for complainant, ordered that the demurrer herein filed by respondent be fixed for argument, on Tuesday, 5th day of February next, at 11 a. m.,
15 and that said respondent be notified hereof.

Circuit Court of the United States for the fifth judicial circuit and district of Louisiana.

Notice of trial of demurrer.

JOHN G. COCKS *vs.* CHAR'S IZARD. } No. 4,073.

You are hereby notified that the demurrer filed in this case is assigned for trial for Tuesday, the 5th day of February, 1867, A. D., at 11 o'clock a. m.

By order of Court.

Witness my hand and seal of the said court, at New Orleans, this 28th day of January, A. D. 1867.

(Signed) F. B. VINOT, *D'y Clerk.*

To D. STEWART, esq'r, solicitor for def't.

Marshal's return.

Received January 29th, 1867; and on the 30th day of January, 1867, served a copy of the within notice on D. Stewart, esq'r,
16 the attorney named herein, personally, at his office, corner of Camp and Gravier street, in this city.

(Signed) J. J. PREIS,
D'y U. S. Marshal.

New Orleans, February 1st, 1867.

Circuit Court of the United States, district of Louisiana.

Certificate of counsel and affidavit of defendant.—Filed February 5th, 1867.

JOHN G. COCKS *vs.* CHARLES IZARD. } In equity.

The undersigned certifies that in his opinion the demurrer filed in behalf of the defendant in this cause is well founded in point of law.

(Signed) D. STUART,
Of Counsel for Def't.

Circuit Court of the United States.

JOHN C. COCKS *vs.* CHARLES IZATD. } In equity.

DISTRICT OF LOUISIANA, *ss:*

17 Charles Izard, defendant in the above-entitled cause, being duly sworn, says that the demurrer filed herein in his behalf is not interposed for delay.

C. IZARD.

Sworn to before me on the 31st January, 1867.

[SEAL]. (Signed) G. H. BRAUGH,
2d Justice of the Peace.

Hearing and submission of demurrer.—From the minutes of February 5th, 1867.

JNO. G. COCKS
vs.
CHAS. IZARD. } No. 4,073.

The demurrer filed by the defendant came up for trial.—John Finney, esq'r, for complainant; D. Stuart, esq'r, for respondent—when, after hearing argument of counsel, the court took time to advise.

Circuit Court of the United States, fifth circuit and district of Louisiana.

NEW ORLEANS, *Monday 11th February*, 1867.

Court met pursuant to adjurnment.
Present—Hon. E. H. Durell, district judge.

18 *Judgment.—November term*, 1867.

JOHN G. COCKS
vs.
CHAR'S IZARD. } No. 4,073.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that the defendant's demurrer be sustained, and complainant's bill dismissed with costs.

Judgment rendered February 11th, 1867.
Judgment signed February 15th, 1867.

(Signed) E. H. DURELL, *Judge*.

United States Circuit Court for the district of Louisiana, in chancery sitting.

Petition of appeal.—Filed July 15th, 1867.

JOHN G. COCKS
vs.
CHARLES IZARD. } No. 4,073.

This petition of the complainant, John G. Cocks, respect-
19 fully represents to your honor that he is advised that there is manifest error to his prejudice in a final decree herein rendered on the 11th day of February, 1867, and signed on the fifteenth of the same month, and that he is desirous to take an appeal therefrom to the Supreme Court of the United States.

Wherefore petitioner prays this honorable court to grant him an appeal from said decree, returnable to the Supreme Court of the United States, according to law, upon petitioner's giving bond in favor of the defendant, with good and solvent security, in such sum as your honor may direct, and conditioned according to law, and for general equitable relief.

(Signed) BRADFORD, LEA & FINNEY,
Solicitors.

Order.

An appeal is allowed in this case as prayed for, returnable to the Supreme Court of the United States, the first Monday of December, 1867, the appellant giving bond in the sum of five hundred dollars, with good and solvent security, conditioned as the law directs.

July 15th, 1867.

(Signed) E. H. DURELL, *Judge.*

20 *Power of attorney.—Filed July 17th, 1867.*

UNITED STATES OF AMERICA,
State of Louisiana, Parish and City of New Orleans:

By this act of procuration be it known, that on this twentieth day of March, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the United States of America the ninetieth, before me, William Shannon, a notary public in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared John G. Cocks, esq'r, of Holmes county, Mississippi, who declared that he had made and appointed, and does, by these presents, make, nominate, ordain, authorize, constitute, and appoint, and in his place and stead, depute and put, William C. Tulham, of this city, to be his true and lawful attorney-in-fact, general and special, giving and by these presents granting, unto the said attorney full power and
21 authority for him, and in his name and behalf, and to his use, to conduct, manage, and transact all and singular his affairs, business, and concerns in this city and State, of whatever nature or kind, without any exception or reservation whatsoever; to open all letters of correspondence addressed to him, and to answer the same; to make and endorse promissory notes in the name of said constituent, and draw, endorse, and accept bills of exchange; to make checks and draw money out of any bank or banks, wherein the same may have been deposited in the name or for the account of said constituent; to deposit drafts, bills of exchange, acceptances, and promissory notes or other obligations for collection in any bank or banks, and withdraw the same or the amount thereof at pleasure, by check or otherwise; to sell and transfer all or any shares of the capital stock of any bank or banks, or other corporate body or bodies, owned by him, and to receive and receipt for the dividends due, or to become due thereon; to pledge and pawn all or any shares of the capital stock of any bank or banks, or other corporate body or bodies, owned by the said constituent, and to make or give any note or notes, which may be necessary, from time to time, for the renewal of the same; to attend all or any meetings of creditors, wherein the said constituent may be interested, and vote in his name on all questions
22 and cases that may be submitted to such meeting or meetings; to attend all or any meetings of the stockholders of any bank or banks, or other corporate body or bodies, wherein the said con-

stituent may be interested, and vote in the name of said constituent on all questions and cases that shall or may be submitted at such meetings; to borrow money from any bank or banks, or other moneyed institution or institutions, person or persons, on the notes or obligations of the said constituent, drawn by him or by the said attorney, or those of others which shall or may come into the hands of the said attorney for the use of the said constituent, and make other notes or obligations, from time to time, for the renewal of all such or any part or parts thereof; to sell, transfer, and convey, or to mortgage or pledge all or any part or parts of the real, personal, or mixed estate of the said constituent; to receive the price of such sales; to lease, let, or hire all or any part of the real estate belonging to the said constituent, and receive and receipt for the rent and wages thereof, as the same fall due; and for the full execution of the purposes aforesaid, to make, sign, and execute, in the name of the said constituent, all acts, whether of sale, mortgage, lease, release, contract, compromise, covenant, deed, agreement or otherwise, that shall or may be requisite or necessary, and bind the said constituent thereby
23 as firmly as if the same were or had been his own proper acts and deeds; to sign all bonds or other acts required by the revenue department, at the custom-house of this district or elsewhere, and do all custom-house business whatsoever; to receive and attend to all shipments or consignments of produce, goods, wares, or merchandise that shall or may be made to him, either for his own account and risk, or that of others, and to pursue the instructions of the owners, shippers, or others interested therein, relative thereto; to receive and acknowledge notices of protest of all or any bills, drafts, or promissory notes to which the said constituent may be a party, and to act for the said constituent and be his substitute in all cases wherein he may be appointed the agent or attorney of others; and to ask, demand, have, take, sue for, and by all lawful ways and means to recover and receive of and from all and every person and persons whomsoever, body or bodies corporate, all and every such sum and sums of money, goods, debts, property, and effects whatsoever, as now is, or are, or may hereafter be in his, her, or their custody or possession, due, owing, coming, or belonging to him the said constituent, whether by bond, bill, note, book, debt, account, consignment, bequest, or for and by what other reason or means
24 soever, and to that end, with whom it may concern, to adjust and settle all accounts, and upon recovery and receipt in the premises, to make and give good and sufficient discharges and acquittances; to appear before all courts of law and equity, there to do, prosecute, and defend, as occasion shall require, and to compromise, compound, and agree in the premises, by arbitration or otherwise, as the said attorney shall in his discretion think fit.

The said constituent hereby revoking a certain power-of-attorney by him granted to the said Wm. C. Fulham, by act before the undersigned notary, on the 27th day of July, 1865.

This act is stamped in accordance with the internal revenue law, by placing a one dollar stamp hereon and cancelling the same.

And generally to do and perform all and every other act, matter, and thing whatsoever, as shall or may be requisite and necessary, touching or concerning the affairs, business, and concerns of the said constituent, as fully, amply, and effectually, and to all intents and purposes with the same validity as if all and every such act, matter, or thing were or had been herein particularly stated,
25 expressed, and especially for, or as he, the said constituent, could or might do, if personally present; also, with full power of substitution and revocation, the said constituent hereby ratifying and confirming all and whatsoever the said attorney or his substitute shall lawfully do, or cause to be done, by virtue of this act of procuration.

Thus done and passed at my office, at New Orleans aforesaid, in the presence of Obed C. Miller and Nich's J. Hoey, competent witnesses, both of this city, who hereunto sign their names, with the said constituent and me, the said notary, the day and date aforesaid.

(Original signed) JOHN G. COCKS.
" " OBED. C. MILLER.
" " NICH'S J. HOEY.
" " WILLIAM SHANNON,
Not. Pub.

A true copy.
[SEAL.] (Signed) WILLIAM SHANNON,
Not. Pub.

[5-c. stamp, cancelled.]

26 United States Circuit Court for the district of Louisiana.—In chancery sitting.

Petition of appeal lodged in the clerk's office, and filed June 18th, 1867.

JOHN G. COCKS
vs.
CHARLES IZARD. } No. 4,073.

The petition of the complainant, John G. Cocks, respectfully represents to your honor that he is advised that there is manifest error to his prejudice in a final decree herein rendered, on the 11th day of February, 1867, and signed on the fifteenth of the same month, and that he is desirous to take an appeal therefrom to the Supreme Court of the United States.

Wherefore petitioner prays this honorable court to grant him an appeal from said decree, returnable to the Supreme Court of the United States, according to law, upon petitioner giving bond in favor of the defendant, with good and solvent security, in such sum as your honor may direct, and conditioned according to law, and for general equitable relief.

(Signed) BRADFORD, LEA & FINNEY,
Solicitors.

An appeal is allowed in this case, as prayed for, returnable to the Supreme Court of the United States, the first Monday of December, 1867, the appellant giving bond in the sum of five hundred
27 dollars, with good and solvent security, conditioned as the law directs.

July 15th, 1867.

(Signed) E. H. DURELL, *Judge.*

CLERK'S OFFICE:

A true copy of the original on file.
New Orleans, July 18th, 1867.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

Endorsed: Copy of petition and order of appeal, lodged the 18th day of July, 1867, in pursuance of the statute of the United States in such case made and provided, for the above-named defendant, Charles Izard. (Signed) Bradford, Lea & Finney, solicitors for pl'ff.

Appeal bond.—Filed July 17th, 1867.

Know all men by these presents, that we, John G. Cocks, as principal, and J. H. Carter, as surety, are held and firmly bound
28 unto Charles Izard in the sum of five hundred dollars, to be paid to the said Charles Izard, his heirs, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals, and dated in the city of New Orleans, on this fifteenth day of July, eighteen hundred and sixty-seven.

Whereas, the above-bounden John G. Cocks has this day prayed an appeal from a judgment rendered by the honorable the Circuit Court of the United States for the district of Louisiana, in the suit of John G. Cocks *vs.* Charles Izard, which judgment was rendered on the 11th and signed on the fifteenth of February, 1867.

Now, the condition of the above obligation is such, that the above-bound John G. Cocks shall prosecute his appeal, and shall satisfy whatever judgment and all damages and costs that may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise the said J. H. Carter, surety, shall be liable in his place.

[SEAL.] (Signed) JOHN G. COCKS.
Per pro W. C. FULHAM.

29 [SEAL.] (Signed) J. H. CARTER.

Signed, sealed, and delivered in presence of—
(Signed) JOHN B. BEE.
W. M. MINOR.

Circuit Court of the United States, fifth circuit and district of Louisiana.

UNITED STATES OF AMERICA:

CLERK'S OFFICE.

I, Dominick Urban, clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 29 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of John G. Cocks *vs.* Charles Izard, No. 4,073 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 3d day of August, A. D. 1867.

[SEAL.] D. URBAN, *Clerk.*

[5 cent int. rev. stamp.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 3d day of August, A. D. 1867.

E. H. DURELL, *Judge.*

[5 cent int. rev. stamp.]

30 JOHN G. COCKS *vs.* CHARLES IZARD. } No. 4,073.

THE UNITED STATES OF AMERICA, *District of Louisiana*:

The President of the United States to Charles Izard, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday of December next, pursuant to a petition and order of appeal filed in the clerk's office of the Circuit Court of the United States for the fifth circuit and district of Louisiana, wherein John G. Cocks is complainant and appellant, and you are defendant, to show cause, if any there be, why the judgment rendered against the said complainant, as in said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, esq., Chief Justice of the Supreme Court of the United States, this seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-seven.

E. H. DURELL, *Judge.*

Endorsed: United States Circuit Court. No. 4,073. John G. Cocks *vs.* Charles Izard. Citation of appeal. Marshal's return. Received July 17th, 1867; and on the 18th day of same month and year served a copy of the within citation of appeal on Charles Izard, the defendant named herein, by giving the same into the hands of Sam'l R. Walker, esq., attorney for said defendant, the said Walker accepting service of the same for the defendant Izard. New Orleans, July 18th, 1867. M. Egan, D'y U. S. Marshal:

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN G. COCKS
vs.
CHARLES IKARD. 2

The bill is filed to have a conveyance from Defendant of certain real estate in New Orleans, purchased by him on 28th January, 1865, at the Marshal's sale, under a judgment rendered by the Provisional Court in a suit by Robert Anderson, Trustee, against the complainant.

The title of Defendant is assailed :

1. For want of jurisdiction in said court over the cause.
2. Because the complainant was never served with process.
3. Because he was neither an inhabitant, resident, or sojourner of the State of Louisiana.
4. Because he had no notice of seizure, or the appointment of appraisers as required by the laws of said State.
5. Because the defendant, at the time of the sale, "gave out and let it be understood that he was purchasing" for the complainant, and thus restrained others from bidding who did not wish to compete with a party understood to represent the complainant and thus obtain the property at a sum greatly below its value.

The prayer of the Bill is for an account of rents and profits, and a decree that "the defendant be ordered to execute a valid and sufficient title to said property, unencumbered by any encumbrance resulting from any of defendants' acts or omissions."

To this bill a demurrer was filed. The demurrer was sustained, and from this decree the appeal is taken.

The bill is wanting in that certainly required by the rules of equity pleading.

Harrison v. Nixon, 9 Pet., 483.

It should have exhibited the proceedings of the Court under whose judgment the sale was made.

If this had been done, the record may have shown the return of personal service by the Marshal, which would have estopped the complainant from denying it.

It may have shown that the complainant was represented by a curator ad hoc, as in case of absentees, C. C. Art. 50, 57, 3522.

It may have shown that the proceeding was by attachment, which I understand to be the fact.

These remarks apply equally to the alleged want of notice of seizure and the appointment of appraisers.

If these grounds of objections are well taken, they would annull the sale. The defendant, by his purchase, would have acquired no title, and, therefore, the Circuit Court of the United States would have no jurisdiction in equity, the remedy being adequate at law.

The Provisional Court was established by the order of the Executive, dated 20th October, 1862, and for the convenience of examination, I quote it at length:

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be

a Court of Record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be Provisional Judge to hold said Court, with authority to hear, try and determine, all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the Courts of the United States and Louisiana, his judgment to be final and conclusive. And I do hereby authorize and empower the said Judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said Court, who shall perform the functions of attorney, marshal and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said Judge.

"These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensation as follows.

* * * * * * * * * *

"Such compensation to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such Judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

"ABRAHAM LINCOLN."

By act of 28th July, 1866, 14 Stat., 344, it is declared that all suits, prosecutions and proceedings of said Court, are to be transferred into the Circuit Court, United States, and be proceeded with in said Court, as if originally commenced therein.

And in all cases where judgments have been rendered by the Provisional Court, they shall become the judgments of the Circuit Court, and may "be enforced, pleaded and proved," as judgments of said Circuit Court.

In considering the validity of this action by the Executive, and its ratification by Congress, we are not embarrassed by the question as to the status of the citizens of the State, after the war had terminated.

We have now to deal with a far simpler question, to wit, the power of the Government over territory while in its military occupation, and while war was flagrant.

The ord r itself states the necessity for organizing the Court. Founded on necessity, the existence of Court terminated when the necessity no longer existed. It was to endure while military occupation lasted, and to terminate when "civil authority was restored in the city and State."

That the Government during the late war had the power to exercise belligerent rights, is settled by the adjudication of this Court in recent cases.

No distinction can therefore be drawn, as is attempted in appellant's brief, between a domestic and foreign war.

That in a foreign war this power could be exercised, is not a case of first impression in this Court.

In Cross v. Harrison, it was decided that the Executive had the right to establish a government in San Francisco, conquered from Mexico, and to impose duties upon imports. This was held a lawful exercise of belligerent rights, over a conquered territory.

16 How., 164.

In Lillendoffer v. Webb, a similar doctrine was held in reference to the conquest of New Mexico, and the judicial system therein established.

20 How., 176.

The principles of these decisions are so well founded in the laws of nations as to need neither citation nor argument.

In the exercise of the jurisdiction there conferred, the Judge was to conform his mode of proceeding as far as possible "to the practice of the State Courts and the Courts of the United States." He was also "to make such rules and regulations as may be necessary." In the exercise of this discretionary power his action can not be challenged in any court. It was for him to determine how far it was possible to conform his proceedings to the practice of the other courts. By the very terms of the power conferred his judgments were "to be final and conclusive.

The judgment in this case having, by the act, been transferred into the Circuit Court to be treated there as a judgment of its own, if the Defendant had been guilty of fraud at the sale in deterring bidders by false representations, an application on that ground could have been made to the Court to set aside the sale and order a re-sale.

Winn v. Elgee, 6 Robinson, 100.
Lisle v. Rhodes, 7 Lousi., 91,
Stout v. Voorhies, 4 Lousi., 396.

Or an action may have been instituted to recover damages for loss arising from this misconduct.

The bill, therefore, can only be maintained in equity, on the ground that the declarations made at the sale created a trust in favor of the complainant.

This is evidently the view of the pleader who seeks a *conveyance of the title from the defendant.*

In doing this he should have made those persons parties to whom Irard conveyed the property. That there were such parties, is shown by the prayer that he should convey "a valid title, unencumbered by any encumbrance resulting from any of the defendant's acts,"

Do the statements of the bill show a case of trust?

There was no relationship between the complainant and defendant which made it the duty of the latter to protect the interest of the former.

There was no promise or agreement to purchase on which the complainant reposed.

The complainant furnished no part of the money with which the purchase was made.

The mere declaration of a vendor, that he intends to buy for another, without evidence of any previous agreement to do so, or of any advance of money for that purpose, raises no trust which can be supported in equity.

Lloyd v. Linch, 28 Penn., 423.

In Patterson vs. Horn it is said "it is necessary in such a case as this, that Horn should have agreed beforehand to buy for Patterson, *and* in consequence of such agreement have got the land at an under value, before a Court of Equity will decree the execution of the trust on payment of purchased money.

Patterson vs. Horn, 1 Grant, 303.

If there was fraud in the conduct of the purchaser it arose *subsequently to the sale* in refusing to comply with the representations made at the time of the sale. The bill does not allege that the representations were made fraudulently, on the contrary it avers that even after the sale the defendant admitted his obligation to carryout the promises.

No subsequent fraud can make the purchaser a trustee ex maleficio.

P. PHILLIPS,
For Appellee.

SUPREME COURT OF THE UNITED STATES,

December Term 1868, No. 142.

JOHN G. COCKS, APPELLANT

vs.

CHARLES IZARD, APPELLEE.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR DISTRICT OF LOUISIANA.

SUPREME COURT OF THE UNITED STATES,

December Term 1868, No. 142.

JOHN G. COCKS, Appellant,
against
CHARLES IZARD, Appellee,
} Appeal from circuit court of United States for district of Louisiana.

ABSTRACT OF THE CASE.

Two lots in New Orleans, with a dwelling house and other improvements, of the value of $15,000, whereof appellant was owner, and of which he was in possession by unquestionable title, were, on the 28th of January, 1865, offered for sale by a person who pretended to act as deputy of a pretended marshal of a pretended court, calling itself, and assuming to exercise judicial authority under the title of the United States provisional court for the State of Louisiana.* The same were so offered for sale under an *alias*

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* The only authority for this court was an order of the President, which is printed in Am. Law Reg., vol. 4, N. S., (for Nov. 1864–'5, pp. 536, 7,) and is as follows:

EXECUTIVE MANSION, WASHINGTON, October 20th, 1862.

The insurrection which has for some time prevailed in several of the states of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that state, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the state in military occupation, and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have therefore thought it proper to appoint, and I do hereby constitute a provisional court, which shall be a court of record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a provisional judge to hold said court, with authority to hear, try and determine all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings so far as possible to the course of proceedings and

writ of *fieri facias* issued at the suit of Robert Anderson, trustee, against appellant, although he had no domicil in Louisiana, being a citizen and resident not of that state, but of Mississippi, and although he never was a party to said suit by appearance, and no process therein was served on him, or could have been served on him, inasmuch as he was not at that time even a sojourner in Louisiana. Not only was he absent out of the state during the pendency of the suit, but he had no notice or knowledge of the proceedings under the execution; and the pretended sale was null and void for want of service on him of notice of seizure, or notice to appoint appraisers. Moreover, the appellee gave out, and let it be understood, that he was bidding for account of appellant, and in his interest; and persons at the sale, who were ready and willing to bid for the property, refrained from bidding, from a wish not to compete with appellant or a party who was understood to represent him; and thus competition being prevented, the property was knocked down to appellee at the small sum of $1,500. After the sale, he admitted that he bid off and purchased the property for account of appellant, and promised to reconvey it upon reimbursement of advances and charges, but postponed it, and finally refused to recognize appellant's interest, and asserted adverse title. Ap-

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practice which has been customary in the courts of the United States and Louisiana. His judgments to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal and clerk of the said court, who shall perform the functions of attorney, marshal and clerk, according to such practice and proceedings as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and the State of Louisiana. These officers shall be paid, out of the contingent fund of the War Department, compensation as follows: The judge at the rate of three thousand and five hundred dollars per annum; the prosecuting attorney, including the fees, at the rate of three thousand dollars per annum; the marshal, including the fees, at the rate of three thousand dollars per annum; and the clerk, including the fees, at the rate of two thousand and five hundred dollars per annum, such compensation to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission.

Let the seal of the United States be hereunto affixed.

[L. S.] ABRAHAM LINCOLN.

By the President.

WILLIAM H. SEWARD,
Secretary of State.

pellee having enjoyed the rents, worth for 1865 fully $1,000, and for 1866 fully $1,500, the bill of appellant asks an account, crediting him with the price paid by him, and all other lawful charges and expenses, and charging him with rent since the 28th of January, 1865; and the bill asks in respect to the balance such decree as may be proper, and prays that appellee be ordered to execute to appellant a valid and sufficient title. Notwithstanding the facts above stated, which are alleged in the bill and by the demurrer thereto, admitted to be true, the demurrer was sustained, and the bill dismissed with costs.

Points and Authorities.

I. The court mentioned in the bill was not a court competent to exercise *judicial* power, consistently with the constitution of the United States, Art. 3, § 1, 2; *Martin* v. *Hunter's lessee*, 1 Wheat. 328; but was a mere agent of military power, to assist it in preserving order, and to protect the inhabitants in their persons and property. *Jecker* v. *Montgomery*, 13 How. 515.

II. Whatever may be the rule as to territory which had not been ceded in fact to the United States, but was merely conquered territory, within which the United States were exercising belligerent rights (*Cross &c.* v. *Harrison*, 16 How. 190), it is very clear that the rights of individuals to property in the State of Louisiana should have remained undisturbed (*Leitensdorfer &c.* v. *Webb*, 20 How. 177) notwithstanding the order constituting the provisional court for that state; and that so far as the appellant's property has been affected under the proceedings of that court, those proceedings are illegal and void.* Halleck's Internat. Law, ch. 32, § 5, 6, pp. 781, 2.

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*What Major General Halleck did, or authorized in Virginia, was quite different from what was done here. By his order of the 3d of May, 1865, a court of conciliation, consisting of three arbitrators, was established in the city of Richmond. The order expressly declares, that "this court will take no jurisdiction of questions of title to property, nor will its decision be any bar to legal remedies when the civil laws and civil courts are re-established." It provides that "the court will issue the usual process for the attendance of parties and witnesses, and the execution of its decisions;" and that "in its decisions, the courts will be governed by the principles of equity and justice.' A further order of the 12th of June, 1865, provides that "this court will take cognizance of and arbitrate all cases which may be brought before it in regard to the possession of real or personal property; and all cases arising upon alleged breaches o contract, where the contract was made, or any of the defendants may reside in the city of Richmond, or county of Henrico or Chesterfield."

III. The court, constituted under that order, certainly had no greater power and jurisdiction than belong to the district and circuit courts of the United States. Its proceedings should have conformed so far as possible to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana.*

IV. The judgment of the court, so constituted, cannot be more final and conclusive than the judgments of other inferior tribunals. *Floyd* v. *Barker*, 12 Rep. 24; *Blin* v. *Campbell*, 14 Johns. 432. It was competent to shew, and is shewn, that the jurisdiction was exceeded, and proceedings had contrary to law. *Smith* v. *Rice*, 11 Mass. 514. The objection to those proceedings is valid, not merely because of the way in which the court was constituted; it is also valid because the party was not served with process, and was not even in Louisiana, and had no attorney to act for him. *Cavan &c.* v. *Stewart*, 1 Stark. 525, 2 Eng. C. L.; *Ferguson* v. *Mahon*, 11 Adol. & El. 179, 39 Eng. C. L.; *Meeus* v. *Thellusson*, 8 W. H. & G. (Excheq.) 638; 1 Rob. Pract. 202. Under such circumstances, the proceedings both of the court and its marshal are "void, to all intents and purposes." *Herbert* v. *Cook*, 3 Dougl. 101, 26 Eng. C. L.; *Briscoe* v. *Stephens*, 2 Bingh. 213, 9 Eng. C. L. No right could pass under the marshal's sale. *Shelton* v. *Tiffin &c.*, 6 How. 186, 7.

V. The sale is void, not only because it was made without a legal execution, but also because it was made without those steps, which, in Louisiana, are necessary to be taken to render a sale under execution valid. 1 Henn. Dig. (of Louis. Rep.) 650, 51, and cases there cited; *Collier* v. *Stanbrough*, 6 How. 21.

VI. Whether the marshal's conduct was proper or not, there is shewn against the purchaser fraud; Civ. Code of Louis., Art. 1841, 1842; *Badon* v. *Badon*, 6 Louis. 257; *Brownson* v. *Fenwick*, 19 Id. 435; or a trust. He became not the absolute owner of the land, but a trustee for the appellant. *Jones* v. *Hubard's representatives*, 6 Munf. 261, 6 Call 211; *Keith* v. *Purvis*, 4 Dessauss. 114; *Trice* v. *Pratt &c.*, 1 Dev. & Bat. (Eq.) 626; *Combs* v. *Little*, 3 Green's Ch. R. 310.

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*It will be seen that the order of October 20, 1862, contemplated the exercise of "such powers and jurisdiction as belong to the district and circuit courts of the United States," and expressly required the judge to conform "his proceedings as far as possible to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana."

VII. In every aspect, it was proper to resort to a court of chancery. *Bodley* v. *Taylor*, 5 Cranch 221; the remedies in courts of the United States being not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. *Robinson* v. *Campbell*, 3 Wheat. 222; and this being so, whether the jurisdiction be exercised in Massachusetts. *U. S.* v. *Howland*, 4 Id. 115; or in Louisiana, 1 Story's Eq., § 57. Relief being prayed against a judicial sale of the property, the exercise of equitable jurisdiction was proper on that ground. *Shelton* v. *Tiffin &c.*, 6 How. 185; and to set aside what ought not to stand. It was also proper on the ground of fraud and trust, and the necessity of taking accounts. *S. C.; Trice* v. *Pratt &c.*, 1 Dev. & Bat. (Eq.) 626; *Combs* v. *Little*, 3 Green's Ch. R. 310; 1 Story's Eq., § 68. Not only is the remedy in chancery more complete and adequate than at law. 4 Wheat. 110; 1 Story's Eq., § 76; but there are equities which can be satisfactorily adjusted in a court of equity only. *Duncan* v. *McCalmont*, 3 Beav. 417, 43 Eng. Ch. R.

VIII. The decree should therefore be reversed, and an account should be directed, and, in other respects, a decree made according to the prayer of the bill.

CONWAY ROBINSON,
Counsel for Appellant.

